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MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-64

ROBERT E. IANNELLI, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY BRIEF FOR PETITIONERS

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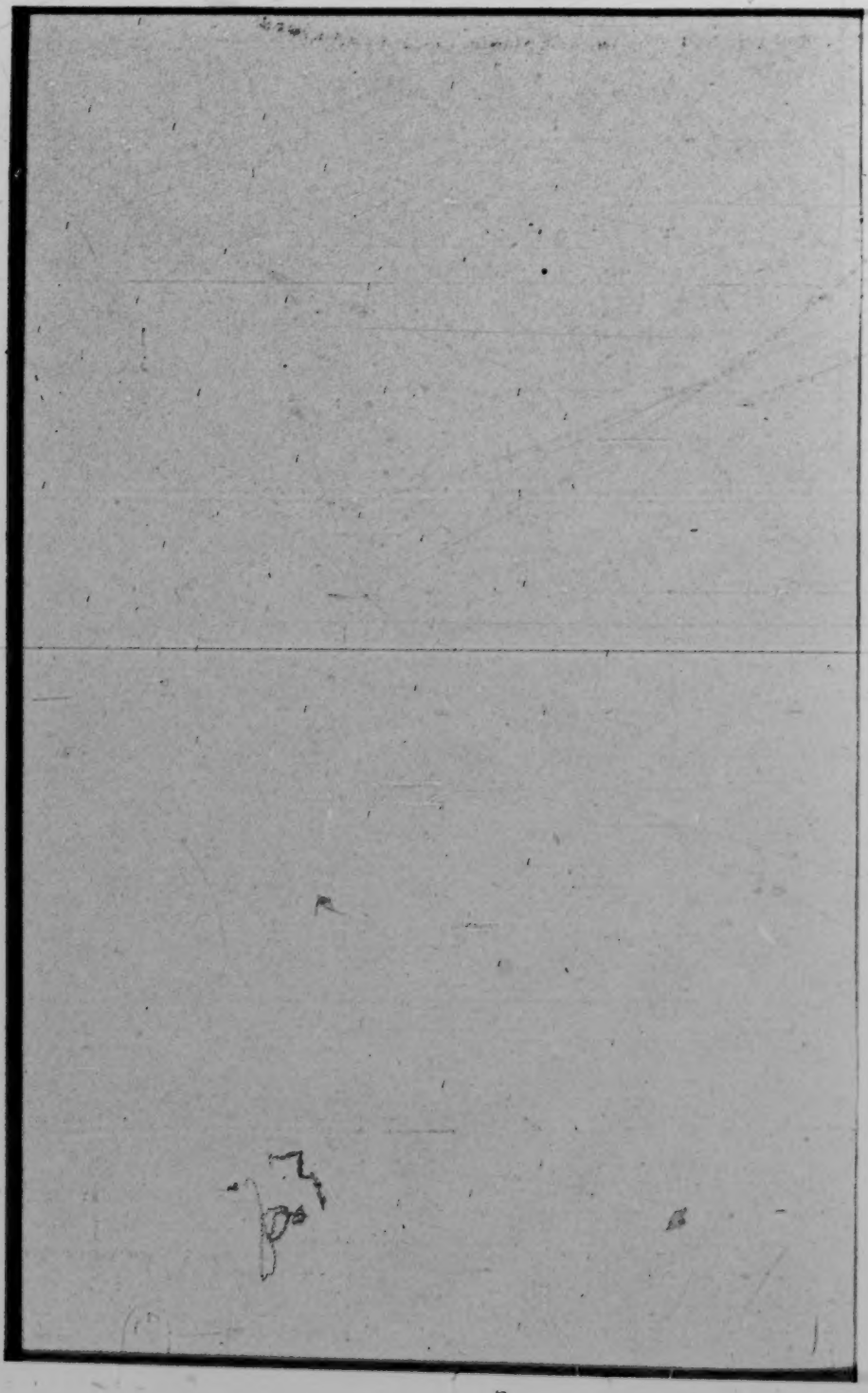

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In his Memorandum for the United States, the Solicitor General has recommended a limited grant of certiorari confined to the issue of the applicability of Wharton's rule. (S.G. Memo, p. 7) While we are gratified that the Solicitor General agrees with us that this issue is of sufficient importance to warrant a grant of certiorari, we respectfully submit that certiorari should also be granted as to the wire interception issue raised by our petition.

The propriety of the authorization procedures utilized by the Department of Justice in securing judicial approval of wire interceptions will be reviewed by this

Court in *United States* v. *Chavez*, No. 72-1319, certiorari granted May 21, 1973, and *United States* v. *Giordano*, No. 72-1057, certiorari granted March 26, 1973. The instant case presents an important evidentiary question not present in *Chavez, supra*, or *Giordano, supra* which should be resolved by this Court at the same time.

The important question in this case which is not found in either *Chavez, supra* or *Giordano, supra*, is: where the propriety of the authorization procedure has been put in issue, who has the burden of proof and what quantum of evidence is necessary to satisfy the burden? In both *Chavez, supra* and *Giordano, supra*, the record is quite clear as to precisely who did what in the various steps of the authorization procedure. While the Solicitor General points out that the district court specifically found that the Attorney General personally authorized the application (S.G. Memo n. 2, p. 3), the question here is whether such a finding was based upon adequate evidence.

Whether the Attorney General personally authorized the application was and is of critical importance in this case. In this case unlike many others in which this question has arisen the Justice Department has not submitted an affidavit from the Attorney General. Affidavits were submitted by Henry Peterson and Sol Lindenbaum and a copy of a memorandum from the Attorney General to Will Wilson allegedly bearing Mr. Mitchell's initials was produced with Lindenbaum's affidavit. (111A). In a deposition Mr. Lindenbaum disclosed that he had never seen the Attorney General initial the memo and that he actually did not know who placed the initials on the memo. (407A, 411A).

In discussing the problems of proof of authentication of documents, McCormick points out that the simplest method of proof is to call a witness who saw the signator sign the offered writing or call the purported signator himself. *McCormick on Evidence*, § 187 (1954 ed.) In this case no such evidence was offered by the Government. Petitioners here are somewhat loath to embark upon a series of lengthy prison terms founded upon a posit of faith rather than proof of facts.

Once an irregularity has been established in the authorization process, as it was here, it is submitted that the burden is on the government to come forward with competent evidence to prove its compliance with the requirements of the statute. The best evidence of what the Attorney General did or did not do is his own testimony; the minimum evidence that should be required is the testimony of an eyewitness to the event.

This court has already recognized the importance of the issues raised by *Chavez, supra* and *Giordano, supra*. It is respectfully urged that the concomitant evidentiary problems raised by the facts of this case are of sufficient importance to warrant resolution by this Court in conjunction with its determination of *Chavez, supra* and *Giordano, supra*. For this reason we respectfully request that certiorari be granted as to both of the questions presented by our petition.

Respectfully submitted,

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Attorney for Petitioners

September, 1973